Filed 2/27/09 In re Pryce CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re OMAR SHERIFF PRYCE on Habeas Corpus.	G038417 (Super. Ct. Nos. M-11169; 03CF1096) O P I N I O N

Original proceedings; petition for a writ of habeas corpus to challenge an order of the Superior Court of Orange County, John Conley, Judge. Petition denied.

Elizabeth A. Missakian, under appointment by the Court of Appeal, for Petitioner.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Kristen Kinnaird Chenelia, Deputy Attorney General, for Respondent.

* * *

Omar Sheriff Pryce seeks a writ of habeas corpus in this court after the trial court denied his petition. We directed the parties to file an informal response and reply on the issue of whether petitioner received ineffective assistance of counsel when counsel failed to call hair stylist Sherri Norals as an alibi witness. Following the parties' submissions, we ordered the petition returned to the trial court for a hearing to take evidence and make findings to enable us to resolve the habeas question. The trial court heard testimony from five witnesses: Norals; petitioner's trial counsel, Early Hawkins; Hawkins's assistant, and two investigators. When the trial court concluded counsel lacked any objectively reasonable tactical reason for not locating Norals or calling her as witness, we issued an order to show cause on the habeas petition, and the Attorney General and petitioner filed their return and traverse, respectively.

Among other arguments, the Attorney General contends it is not reasonably probable petitioner's jury would have acquitted him of first degree robbery-burglary or other charges had the jury heard Norals's testimony. We agree. Norals confirmed petitioner's and his friend's trial testimony that petitioner accompanied the friend to a hair braiding appointment at 4:00 p.m. on the day of the burglary. Norals did not remember how long the braiding session lasted, but surmised it may have been an hour or up to one hour and 15 minutes based on her recollection of the length of the friend's hair. Petitioner and his friend, however, both testified at trial they left the hair salon at 4:45 p.m. Trial testimony also established petitioner arrived outside the scene of the burglary "soon after" 5:00 p.m. (*People v. Pryce* (Sept. 29, 2006, G036322) [nonpub. opn.] (*Pryce*).) The parties stipulated at the habeas evidentiary session below that the driving time from the hair salon to the victim's residence was approximately 13 minutes.

Because the applicable "'presumptions favor the truth, accuracy, and fairness of the conviction and sentence'" (*People v. Duvall* (1995) 9 Cal.4th 464, 474 (*Duval*)) and because, as we observed in petitioner's direct appeal, the evidence placing him at the crime scene was strong, including the eyewitness testimony of two victims (*Pryce, supra*, G036322), we conclude it is not reasonably probable Norals's testimony would have resulted in petitioner's acquittal. We therefore deny the writ petition.

I

FACTUAL AND PROCEDURAL BACKGROUND

Petitioner's jury convicted him of first degree robbery, acting in concert with two or more persons (Pen. Code, §§ 211, 212.5, subd. (a), 213, subd. (a)(1) [count 1]); first degree residential burglary (*id.*, §§ 459, 460, subd. (a) [count 2]); street terrorism (*id.*, § 186.22, subd. (a) [count 3]); and receiving stolen property (*id.*, § 496, subd. (a) [count 4]). The jury also found true the following enhancements: on count 2, a nonaccomplice was present during the burglary (*id.*, § 667.5, subd. (c)(21)); on counts 1 and 2, defendant personally used a firearm (*id.*, §§ 12022.53, subd. (b), 12022.5, subd. (a), respectively); and counts 1, 2, and 4 were committed for the benefit of a criminal street gang (*id.*, § 186.22, subd. (b)(1)). Before trial, defendant pleaded guilty to possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)) and to enhancements for committing the crime while on release from custody with charges pending for receiving stolen property and possession of a concealed firearm (Pen. Code, §§ 496, subd. (a), 12031, subd. (a), 12022.1). The trial court sentenced defendant to a total term of 24 years in state prison, based on the midterm of four years for the robbery count, and consecutive 10-year terms for the gun use and gang enhancements. (See *Pryce, supra*, G036322.)

In *Pryce*, *supra*, G036322, we detailed the circumstances of petitioner's offense as follows, in relevant part:

"*Police Surveillance of Lowell Thomas III*

"The Buena Park Police Department was conducting surveillance of Lowell Thomas III's house on January 31, 2002. About 7:45 p.m., defendant drove up to Thomas's house in a white Oldsmobile, and picked up Thomas and Jerry Johnson. The police followed defendant's car to a Sprint cellular telephone store, where defendant, Thomas, and Johnson entered the store and appeared to go to separate locations within the store. The police observed defendant, Thomas, and Johnson in the store; none of them talked to each other or to any store employee, and none bought anything in the store. Officer Ian Anderson opined they were casing the Sprint store.

"*Robbery of Herbert S.*

"On February 1, 2002, 14-year-old Herbert S. received a telephone call from Vanessa Becerra. Becerra had previously dated Charles L., Herbert's cousin. Becerra asked Herbert if she could come by to drop off a picture of herself; Herbert agreed. Thomas, Becerra's new boyfriend, intended to go to Herbert's house to beat up Charles because Charles had been bad-mouthing him. Defendant drove Becerra and Thomas to Herbert's house in his white Oldsmobile.

"Becerra and Thomas arrived at Herbert's house soon after 5:00 p.m. They went upstairs with Herbert and talked. Thomas told Herbert that his car's tire had popped and excused himself to call the Automobile Club of Southern California (AAA). Thomas went outside and called defendant to let him know Charles was not at Herbert's house. Thomas returned upstairs.

"A few minutes later, two tall Black males entered the house wearing ski masks and brandishing handguns; Thomas testified he recognized them as defendant and Johnson by their voices. They ordered Thomas, Herbert, and Becerra to the floor and said, "Blood, where is Charles?" The gunmen put a hood over Herbert's head and took him to his bedroom and his mother's bedroom while going through their things. They left Herbert in his mother's bedroom, after threatening to shoot him if he took off the hood. Herbert was scared and feared the gunmen would harm him. A few minutes later, Thomas came in to Herbert's mother's bedroom and took the hood off Herbert's head. Either Becerra's or Thomas's cellphone rang, and they told Herbert AAA was waiting by the car. Before leaving, Thomas told Herbert not to call the police because that would make the gunmen more angry and they would want to come back.

"Herbert testified the gunmen took jewelry, a Sony PlayStation 2 videogame system, video games, DVD's and CD's. Herbert's neighbor called the police.

"Unrelated to the robbery, the police began surveillance on Thomas's house between 6:00 and 6:30 p.m. that same evening. About 10 or 15 minutes later, defendant pulled up in a white Oldsmobile; Thomas, Johnson, and one unidentified Black male came out of the house and got into the car.

"The police searched Thomas's house on February 3, 2002. They found a nine-millimeter pistol in Thomas's bedroom and a handgun in Johnson's room. The police also found a CD case and CD's which Herbert identified as those stolen from him and some of which had Herbert's handwriting on them.

"The police searched defendant's residence on February 14, 2002. They found a loaded .45-caliber semiautomatic handgun with two additional ammunition magazines in defendant's bedroom. They also found a PlayStation 2 game system with

Herbert's memory card inside it, a ski mask, and DVD's matching a list of those stolen from Herbert's house.

"*Gang Evidence*

"Detective Abel Morales testified as a gang expert for the prosecution. Morales opined that defendant was an active member of the Insane Crips gang on February 1, 2002 and participated in the robbery of Herbert for the benefit of the gang. This opinion was based on defendant's criminal history, the items found during a search of defendant's bedroom, the fact Insane Crips members are known for committing home invasion robberies, and the fact the robbery was committed with another Insane Crips gang member — Thomas. [¶] . . . [¶]

"*Defense Evidence*

"Defendant testified on his own behalf. He denied being a gang member; he testified he writes lyrics for gangster rap music.

"Defendant testified as follows: he was at Thomas's house on January 31, 2002, and left his video game and memory card there. The next day, defendant picked up his sisters at school and went to Anthony Smith II's house to play video games. Defendant took Smith to get his hair braided at 4:00 p.m., and returned to Smith's house after 5:00 p.m. (Smith testified and confirmed defendant took him to get his hair braided that day.) Defendant bought cigarettes for Smith's mother, and then returned to his own house. Once he was home, defendant realized his Grand Theft Auto video game and PlayStation 2 memory card were at Thomas's house. Defendant called Thomas and told him he was going to pick them up. Thomas met defendant outside Thomas's house and gave defendant what defendant thought were his own video game and memory card.

Defendant then gave Thomas and two others a ride to Becerra's house. After a brief stop, defendant drove Thomas and the others back to Thomas's house, and then returned home.

"Defendant testified he bought the PlayStation 2 in his room at Best Buy. (On rebuttal, the prosecution introduced an affidavit from Sony that the PlayStation 2 found in defendant's room was purchased at Toys "R" Us.) Defendant testified he had a handgun in his room for self-defense because his recording equipment had been stolen. He said he also used the gun and a ski mask as props when posing for album covers or posters." (*Pryce*, *supra*, G036322.)

At the habeas evidentiary hearing held in March 2008, Norals testified petitioner generally had a hair appointment with her every Friday in early 2002. On February 1, 2002, however, petitioner called ahead to notify Norals that his friend, Smith, would take his slot if it could be moved to 4:00 p.m. Smith wanted his hair braided. Norals agreed, and made a notation of the change in her appointment book. Petitioner accompanied Smith to the appointment, and remained in the salon the entire time. Noral recalled that petitioner and Smith arrived at the salon in petitioner's white Oldsmobile. When Norals saw Smith, she realized she had met him four or five years earlier when she lived in the same apartment complex with his parents. They talked about his family during the appointment.

Based on "remembering the length of [Smith's] hair," Norals "guesstimat[ed]" the appointment lasted "an hour" to "an hour and 15 minutes." According to Norals, "It wasn't any time less than an hour, that's for sure." Norals explained the time it takes to braid cornrows, the style Smith requested, "depends on the size of the person's head . . . and the length of their hair. But typically [takes] anywhere from an hour to an hour and a half." Norals had never braided Smith's hair before.

Norals did not have her appointment book at the habeas hearing. She had verified the 4:00 p.m. appointment change by checking the appointment book, which she located at her storage facility, when Hawkins first contacted her, which may have been before or sometime after petitioner's trial in July 2004. But by the time Hawkins contacted her again a month later, she was behind on her storage facility rent and could not access the appointment book. Hawkins informed her he would subpoena the appointment book from the storage facility if he needed it. She eventually spoke with Hawkins again, but not about petitioner's case. According to Hawkins, he did not have contact with Norals until months after petitioner's sentencing in late 2005, when she called him to represent her son in a proceeding, and he agreed.

At petitioner's trial, Smith testified Norals always did his hair, braiding it twice a week on Tuesdays and Fridays. It generally took around 45 minutes. He and petitioner arrived about five minutes early for his 4:00 p.m. appointment on February 1, 2002. They left the salon about 4:45 p.m. and returned to Smith's house.[1] They went out to buy Smith's mother cigarettes, returned to the house, and then petitioner departed after 5:20 p.m. Petitioner corroborated Smith's account, including that Smith had regular appointments with Norals and that Smith's braiding appointment on the date of the offense was at 4:00 p.m. and lasted 45 minutes.

II

DISCUSSION

Petitioner contends he was prejudiced by counsel's failure to locate and call Norals as a witness because, had he done so, neither Smith nor petitioner would have had

[1] The parties stipulated at the habeas hearing that the salon was about four miles from Smith's house, with a driving time of about 12 minutes, and that it was about eight miles from Smith's house to the victim's residence, with a driving time of 20 minutes.

to take the stand to present his alibi defense. Therefore, the jury would have had heard Norals's lengthier, more favorable time estimate for the hair appointment, instead of the 45-minute period Smith and petitioner admitted, which afforded petitioner ample time to reach the victim's home. The purpose of habeas proceedings, however, is not speculation or gamesmanship concerning what evidence might have been omitted, but to determine whether petitioner's habeas case fatally undermines confidence in the jury's verdict. (See *United States v. Cronic* (1984) 466 U.S. 648, 656-658 (*Cronic*); *In re Avena* (1996) 12 Cal.4th 694, 721-722 (*Avena*).) Here, moreover, it appears counsel would have called Smith or petitioner even if he also called Norals because the alibi rested in part on the pair's claimed itinerary after leaving the salon, which only Smith or petitioner could provide. Hawkins explained at the habeas hearing that he sought Norals's testimony because it corroborated Smith's account of the salon appointment "by someone who was not Omar Pryce's friend[.]" The implication is that Hawkins would have called Norals to bolster Smith's credibility and not as a witness in lieu of Smith or petitioner. Petitioner's claim we should ignore his and Smith's testimony is therefore without merit.

Indeed, "[t]o determine whether prejudice has been established, we compare the actual trial with the hypothetical trial that would have taken place had counsel competently investigated and presented the alibi defense." (*In re Marquez* (1992) 1 Cal.4th 584, 604 (*Marquez*).) The petitioner bears the burden to establish a reasonable probability that, but for counsel's alleged deficiencies, the trial's outcome would have been more favorable to him. (*Strickland v. Washington* (1984) 466 U.S. 668, 694.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Ibid.*) A court need not determine whether counsel's performance was deficient before assessing its prejudice, if any. (*Id.* at pp. 699-700.) "If it is easier to

dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." (*In re Jackson* (1992) 3 Cal.4th 578, 604, disapproved on another ground by *In re Sassounian* (1995) 9 Cal.4th 535, 545.)

Petitioner argues a more stringent standard than outcome assessment applies because counsel's alleged dereliction entirely denied petitioner adjudication of his alibi defense, amounting to structural error impossible to evaluate for prejudice and therefore requiring per se reversal. (See *Cronic*, *supra*, 466 U.S. at pp. 658-659; *Avena, supra,* 12 Cal.4th at pp. 721-722.) Petitioner overstates the matter. He was not denied his alibi defense; rather, he presented it with his own testimony and Smith's, but contends it was simply less effective.

We conclude that even if Norals had testified, it is not reasonably probable petitioner would have gained acquittal, nor does it cast doubt on the reliability of the jury's verdict. We must view the evidence in the light most favorable to the jury's verdict. (*Duvall*, *supra*, 9 Cal.4th at p. 474.) The timeline suggested by Norals's testimony made it more difficult but not improbable to conclude petitioner arrived at the victim's home "soon after" 5:00 p.m. as recited in our opinion on direct appeal (see *Pryce*, *supra,* G036322). Petitioner need only have proceeded directly from the salon to the victim's home, dropping Smith off along the way, which the jury already implicitly concluded in rejecting Smith's and petitioner's account they went to Smith's home.

We note the victim actually testified Becerra and Thomas arrived at his home "sometime" after 5:00 p.m., with the trio conversing upstairs in the residence before Thomas excused himself to make a phone call. Several more minutes passed before the assailants entered the residence. All this presents time frames of uncertain

leeway that we must resolve in favor of the verdict. (*Duvall*, *supra*, 9 Cal.4th at p. 474.) Additionally, Norals testified more than six years after the hair appointment, basing her time estimate on braiding cornrows generally and a claimed recollection of Smith's hair length; she did not account for Smith's admission he arrived at the appointment early. We find it unlikely the jury would have ignored Smith's and petitioner's admission they left the salon at 4:45 p.m., affording more than ample time for petitioner to reach the victim's home.

Moreover, as noted in our earlier opinion the evidence placing defendant at the scene was "strong." (*Pryce*, *supra*, G036322.) Defendant protests that Becerra's and Thomas's testimony could not be trusted because both had a motive to protect Thomas and Thomas, in particular, had received a favorable plea deal. But the jury knew full well of petitioner's claim of bias and rejected it. Similarly, petitioner argues that at five feet seven inches tall he does not fit the victim's description of his assailants as "tall," but the jury rejected petitioner's quarrel with identification, and the argument gains no strength had Norals's completely unrelated testimony been admitted. Petitioner attacks the circumstantial evidence linking him to the crime, noting his possession of the victim's PlayStation memory card is reconcilable with merely receiving stolen property. But Norals's testimony would have had no impact on the striking coincidence the police also found in petitioner's room a ski mask and a gun like those used in the robbery, pointing strongly to his direct involvement. (*Duvall*, *supra*, 9 Cal.4th at p. 474.) The police also observed petitioner with Thomas and the other perpetrator, Johnson, within an hour of the offense. Accordingly, we conclude it is not reasonably probable the jury would have acquitted petitioner had Norals's testimony been presented.

III

DISPOSITION

The habeas petition is denied.

ARONSON, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

IKOLA, J.